UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

E. C. BOWES and N. ANDREWS, Co-partners doing business under the firm name and style of BOWES & ANDREWS, Claimants of the Steamship "HOQUIAM," her engines, tackle, apparel and furniture,

Appellants,

—vs.—

W. M. BAUMERT,

Appellee.

No. 3155

BRIEF OF APPELLANTS

HUFFER & HAYDEN,
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F. A. HUFFER,
PERCY P. BRUSH,
IRA CAMPBELL,
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STATEMENT OF CASE.

On April 13, 1917, the appellee filed his libel against the steamship "Hoquiam" to recover for injuries sustained on May 11, 1916, while working as a longshoreman in the hold of the steamer loading railroad ties at Hoquiam, Washington.

Appellee's injury resulted from a load of railroad ties swinging against him, knocking him down and being lowered upon him in the operation of swinging the load from the dock into the starboard or off-shore wing of the vessel.

The loading was under the supervision of the second mate, who acted as hatch tender, and the court found the hatch tender caused the load to be swung in onto the appellee without knowing the position of the appellee at the time, and that the accident was caused by the carelessness of the hatch tender in so doing, and that the hatch tender was a seaman in command of the appellee, one to whom the LaFollette Act had extended the exemption of the fellow servant rule; that section 20 of said Act of March 4, 1915 (38 S. L. 1185), governed the relationship of the parties, and the court concluded that the appellants were liable to the appellee for his injuries.

Judge Cushman heard the evidence of the appellee in open court. The evidence of the appellant was by deposition with the exception of one witness who testified only concerning the method of employment of appellee. Under the familiar rule concerning conflicting testimony, where the lower court has heard all or a part of the witnesses testify, we shall not ask this court to review the testimony in connection with the cause of the accident or whether appellee's negligence contributed.

We intend to ask the court to review the sole issue of whether or not, under the testimony, the hatch tender, a seaman employed by the ship, and the appellee, a longshoreman employed from the land by the ship to assist in loading the vessel, were

fellow servants, and whether, if they were fellow servants under the old rule, that relationship has become immaterial in view of the Act of March 4, 1915.

It seems to have been conceded at the trial that appellee could not recover except by virtue of the force of the Act above referred to.

On the morning of the accident the appellee was sent to the ship by the Grays Harbor Stevedoring Company, and as soon as appellee entered upon his duties aboard the ship the officers of the ship had full control over him with power to discharge. (Apostles, p. 152). Appellee understood that the Grays Harbor Stevedoring Company were simply agents for the steamer in arranging for the men to work upon her. (Apostles, p. 58).

The vessel was in perfectly seaworthy condition; none of its gear broke, nor were any of its appliances out of order and nothing gave way. All the men were working with the one object of getting the vessel loaded. The appellee was not a seaman —he was a longshoreman hired by the hour.

Appellants' contention is that the above act, by its language, its setting and the subject matter under consideration by Congress, only applies to seamen in the commonly accepted sense of the term, and does not relate to other workmen temporarily

on the vessel to perform some service in port. These issues are raised by the pleadings.

SPECIFICATION OF ERRORS.

Appellants make the following specification of errors:

1. That the court erred in finding and holding that the word "those" in the expression "with those under their authority" in section 20 of the Act of Congress of March 4, 1915, found in volume 38, U. S. S. L. p. 1185, means "those injured" instead of "those seamen." (Apostles, p. 174. Exception XXIV).

2. That the court erred in finding and holding that the word "those" in the expression "with those under their authority" in section 20 of the act above referred to, includes persons other than seamen. (Apostles, p. 174. Exception XXV).

3. That the court erred in finding and holding that the word "those" in the expression "with those under their authority" in section 20 of the act above referred to includes longshoremen situated and employed as was libelant at the time of the accident. (Apostles, p. 175. Exception XXVI).

4. That the court erred in finding and holding that section 20 governed the case of libelant herein as he was situated and employed at the time of the accident. (Apostles, p. 175. Exception XXVII).

5. That the court erred in refusing to find that libelant was a fellow servant with the hatch tender. (Apostles, p. 175. Exception XXVIII).

6. That the court erred in refusing to enter a decree dismissing the libel and awarding claimants their costs and disbursements in this action. (Apostles, p. 175. Exception XXX).

7. That the court erred in ordering, adjudging and decreeing that libelant recover from claimants and their sureties fifteen hundred dollars, together with costs and disbursements in this action. (Apostles, p. 176. Exception XXXII).

ARGUMENT.

The appellants' hatch tender and appellee worked under a common master with the sole object of loading the vessel. (Apostles, pp. 84 and 85). The injury was occasioned solely by the direction of the hatch tender to the winchman to swing the ties into the wing when the hatch tender might have known that the appellee would be injured thereby.

It seems that the judgment is erroneous unless the authority of the following cases has been nullified by the Act of March 4, 1915, viz:

Baltimore & Ohio R. Co. vs. Baugh (149 U. S. 368, 37 Law Ed. 732);

New England R. R. Co. vs. Conroy, (175 U. S. 323, 47 Law Ed. 181);

The Osceola (189 U. S. 158, 47 Law Ed. 760);

Herman vs. Port Blakeley Mill Co. (71 Fed. 853);

The Elton (142 Fed. 367-375).

The title of the Act of March 4, 1915, reads as follows "An Act to Promote the Welfare of American Seamen in the Merchant Marine of the United States; to abolish arrest and imprisonment as a penalty for desertion, and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." (38 Stat. p. 1164).

Section 20 of the act reads as follows: "That in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority."

The intent of Congress is to be determined from the general view of the whole act with reference to the subject matter to which it applies. (36 Cyc., p. 1128). In order to understand the preceding law by this act amended, and to assist in gathering the subject matter under consideration by Congress, we will consider the act section by section.

Section 1 of the Act of March 4, 1915, amends section 4516 of the Revised Statutes under the title "Merchant Seamen—Shipment". Section 4516 R. S. is found in the Act of June 7, 1872 (14 S. L. 265). The Act of June 7, 1872, is entitled: "An

Act to Authorize the Appointment of Shipping Commissioners by the Several Circuit Courts of the United States; to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for further protection of seamen". (14 S. L., p. 262).

Section 2 of the Act of March 4, 1915, is a new section referring to the division of crew, fire drills and fixing holidays.

Section 3 amends section 4529 R. S. under title of "Seamen—Wages and Effects". Section 4529 R. S. is the product of section 6 of "An Act for the government and regulation of seamen in the merchant service" passed by the First Congress of the United States. (Act of July 20, 1790, 1 S. L. 133, and Section 35 of the Act of June 7, 1872, *supra*, authorizing the appointment of shipping commissioners).

Section 4 amends section 4530 R. S. under title of "Merchant Seamen—Wages and Effects". Section 4530 is the same as section 6, p. 133. Vol. 1 S. L., Act of June 20, 1790.

Section 5 amends section 4559 R. S. under title of "Merchant Seamen—Protection and Relief". Section 4559 is section 12 of the Act of July 20, 1840, entitled "An Act in Addition to the Several Acts Regulating the Shipment and Discharge of Sea-

men and the Duties of Consuls". (Vol. 5, S. L. 394).

Section 6 is an amendment of section 2 of an act entitled "An Act to amend Laws relating to Navigation", approved March 3, 1897. (29 S. L. 688).

Section 7 amends section 4596 R. S. under title of "Merchant Seamen—Offenses and Punishments". Section 4596 is section 51 of the Act of June 7, 1872, *supra*, for the government and regulation of seamen.

Section 8 amends section 4600 R. S. under title of "Merchant Seamen—Offenses and Punishments". Section 4600 is an enlargement of section 56 of the Act of June 7, 1872, *supra*.

Section 9 amends section 4611 R. S. under title of "Merchant Seamen—Offenses and Punishments". Section 4611 R. S. abolishes flogging and is found in the Act of Sept. 28, 1850 (Vol. 9, S. L. 515), entitled "An Act making appropriation for the Naval Service ending June 30, 1851".

Sections 10 and 11 amend an act entitled "An Act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce", approved December 21, 1898.

Section 12 repeals section 4536 R. S. Section 4536 is section 61 of the Act of June 7, 1872. Sec-

tion 12 relates to the invalidity of the attachment of wages and broadens the effect of the section repealed.

Section 13 amends section 4463 R. S. under title of "Regulations of Steam Vessels—Transportation of Passengers and Merchandise". Section 4463 was section 14 of the Act of February 28, 1871 (16 Stat. 446), entitled "An Act to Provide for the better security of life on board vessels propelled in whole or in part by steam, and for other purposes".

Section 14 amends section 4488 R. S. under same title as last above. Section 4488 is section 52 of the Act of February 28, 1871 (16 Stat. 455), and relates to equipment. It also repeals section 4489 R. S. Section 4489 is section 52 of the Act of February 28, 1871, under title last above quoted.

Section 15 makes reports of accidents to barges while in tow subject to the provisions of sections 10, 11, 12 and 13 of chap. 344 of S. L. Act of June 20, 1874 (18 S. L. 128), entitled "An Act to establish life saving stations and houses of refuge upon the sea and lake coast of the United States, and to promote the efficiency of the life saving service".

Section 16 abrogates treaties in so far as they provide for the imprisonment and arrest of officers and seamen deserting or charged with desertion from merchant vessels of the United States in foreign countries, and of seamen of foreign vessels in

the United States, and requiring the president to give notice.

Section 17 provides that after the expiration of notice, the treaties shall be deemed to have expired.

Section 18 provides for the time of taking effect of the Act.

Section 19 amends section 16 of the Act of December 21, 1898, entitled "An Act to amend the laws relating to American seamen and for the protection of such seamen, and to promote commerce". This act requires consuls to care for seamen under certain conditions.

Section 20 is a new section, and is the one requiring construction. It reads: "That in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority."

Having traced the precedent legislation amended or affected by the Act of March 4, 1915, we get a general view of the topic which occupied the attention of Congress, and it related to American seamen in every particular. Having in view that the Act of March 4, 1915, only expressly refers to seamen and the acts amended all relate to seamen, equipment of vessels and safety at sea, nothing appears to suggest that Congress contemplated legislating for any other class of persons.

A resort to the title of an act is a legitimate step in attempting to determine its scope, and we find the following purposes expressed in the title, viz: "To promote the welfare of American seamen; to abolish restraint and imprisonment as a penalty for desertion; to secure the abrogation of treaty provisions; to promote safety at sea." The title does not indicate the act relates to longshoremen. Longshoremen are not American seamen in the merchant marine. Longshoremen never were arrested for desertion, and no treaties affected them, and never was there any legislation for the safety at sea of longshoremen. The title of the act coupled with the body of it does not suggest remedies for ills that may befall longshoremen, but only remedies for ills which beset or may befall seamen.

In seeking the true meaning of Congress its statutes should be construed in regard to the ordinary rules of grammar, or, according to the legal phraseology, "by what is known as the doctrine of 'last antecedent' relative and qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others more remote unless such extension is clearly required by a consideration of the entire act". (36 Cyc., p. 1123, sec. J).

Applying the above rule to the adjective pronoun "those" in section 20, the section would read as fol-

lows: "That in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow servants with those *seamen* under their authority."

Judge Cushman used this language in his opinion:

> "All of this setting that you have described seems to bear out that that was what Congress was leading to, but the language of the act itself seems to be so studied, it would have been so simple to say that 'in a suit by any seaman' this should have been the rule, but unless it was intended to include something more than seamen, the language 'in any suit for injury'—that is the substance of it; I have not the act before me—that this rule should be applied, it would seem to me that it means something more than seamen. The use of the words, 'a seaman in command,' followed by the word 'those' without saying what, I think it means 'those injured,' instead of 'those seamen.' I think it refers back to the word 'injury' or 'injured.' So, I hold against you on that. There is this about it: Where there is such a close question and such a doubt as to the correct construction, I feel like resolving it in favor of the injured party."

It seems that the words "injury" and "injured" became confused during the court's reasoning and the word "injured" substituted for the word "injury." The word "injured" does not appear in section 20, hence the word "those" must be connected

with the word "injury" if it relates back beyond the word "seamen," which is its next antecedent, and if "those" is placed after "injury" it would make an extremely awkward and ungrammatical sentence. The creation of a whole phrase such as "by those who may be injured" and the insertion of the word "injured" after "those" and the substitution of those for "seamen" would be necessary to couple up the phraseology with the word "those" and "injury" in order to make it possible, without a weirdly strained construction, to read the act as it has been interpreted. This phrase would have to be inserted after the first four words in the section, so that the section would have to be re-formed to read as follows: "That in any suit *by those who may be injured* to recover damages for any injury sustained on board vessel or in its service *those* having command shall not be held to be fellow servants with those *injured* under their authority." The italicized parts show the necessary insertions to revamp the section to conform to the interpretation adopted in this case. The necessity of making these insertions for the sake of euphonious reading and grammatical construction, in order to conform it to the ideas of the lower court, shows how far from the natural meaning and easy, common construction the court has gone to do what it considered kindly to the appellee.

In section 20 there are only two personal nouns

—seamen and fellow servants. If one were reading the section, not knowing the details of modern shipping business, there could not be a possible conception in such reader's mind that the act referred to anyone but seamen. Therefore, not only is it necessary to insert a clause not found in the section, and to violate the ordinary grammatical and legal rules of construction, but to include persons not mentioned in the act to reach an interpretation such as has been placed upon the act by the lower court.

The rule requiring that statutes be interpreted in their natural sense, keeping in view the objects legislated about, suggests that we look at the consequences that would result from giving the construction to the statutes that would include longshoremen with sailors.

It surely was not the object of the statute to place longshoremen in a better position than seamen. The Circuit Court of Appeals for the Second Circuit, in the case of *Chelentis vs. Luckenbach S. S. Co.* (243 Fed. 536), has held that the act has not resulted in changing the seamen's right of recovery beyond his cure and wages where the injury does not result from failure to properly care for the seamen after injury or provide a seaworthy ship. This rule is based on the *Osceola* case. If a seamen is confined to his cure and wages under such circumstances and a longshoreman is given full

damages for his injuries, then the act leaves the seaman in a worse position than the longshoreman, whereas the title and purposes of the act are to promote the welfare of American seamen. Longshoremen have the protection given them by the statutes of the different states. Seamen have not—being controlled by the maritime contract.

We have delayed writing this brief as long as possible to secure the benefit of the various courts' views on the section under consideration. We have been unable to find anything yet decided that is in point. For convenience we will review all the cases that have reached our attention.

The case entitled "*In re Tonawanda Iron & Steel Co.* (234 Fed. 198, Western District of New York), declines to consider the statute as applicable to the facts in that case for the reason that the accident occurred November 2, 1913, and prior to the act going into effect. The following is in the nature of a dictum, therefore, but the court says:

> "The act made a substantial change in the maritime law * * * exacting a new liability * * * making the ship and owner answerable for negligence of officers charged with responsibility of her navigation."

The *Colusa* (241 Fed. 968) was decided by Judge Dooling (California, Northern Division) and on appeal affirmed in 248 Fed. 21. The court will remember in that case that the boatswain placed a

nail instead of a split pin to hold the pelican hook while making the deck lashings fast, and the decision seems more to turn upon the unseaworthiness of the hook than upon any order of the boatswain except in so far as the boatswain's act tended to make the shackle unfit. The boatswain, however, was really not at fault, for the ship did not have any split pins to use to fasten the hook. For this reason the case followed the familiar doctrine that the vessel is liable for her unseaworthiness, rather than placing much, if any, stress upon the fact of the boatswain's position.

In the case of *Sorenson vs. The Alaska S. S. Co.* (243 Fed. 280) Judge Neterer decided the seaman who was injured had not been ordered into the ship's hold where the explosion occurred, and allowed the seaman to recover his wages and cure. On a pure question of fact, this Circuit Court of Appeals affirmed the *Sorenson* case in 247 Fed. at page 294.

In the case of *Chelentis vs. Luckenbach S. S. Co.* (243 Fed. 536) the Circuit Court of Appeals for the Second Circuit held that whether the master and seamen are fellow servants or not is quite immaterial in a suit for injuries resulting from an improvident order, as that question was directly decided by the Supreme Court of the United States in the *Osceola* case, where it was held that granting

they were not fellow servants the seaman's recovery would be for his cure and wages.

In the case of *Corado vs. Peterson*, 249 Fed. 165, a man rope carried away and the court held it was the duty of the owners to maintain a seaworthy ship, and it was also the fault of the first officer if the gear became unsafe during the voyage under the Seamens' Act.

In the case of the *Baron Napier* (249 Fed. 127) a muleteer employed by the master of the vessel only to care for mules was injured by falling at night, and it was held that the ship had failed to furnish proper medical attendance or effect a cure; also that the seaman should have been furnished with a lantern and was not. The case holds that the Seamens' Act abolished the fellow servant doctrine, but it seems that the decision rested more, if not entirely, upon the fact that the vessel failed to furnish proper medical attention for which the vessel was liable, regardless of the Seamens' Act.

The above are the only cases which we have discovered construing the act, and all apply to seamen, unless it be the *Baron Napier* case. All except the *Chelentis* case have placed liability on the ship on well recognized admiralty grounds of liability which were in existence before the act was passed and irrespective of fellow servant rule. In the *Chelentis* case, where it is conceded that a servant

was injured through the negligent order of a seaman in command, it is held the act does not change the extent of the seaman's recovery, which was a fixed right prior to the enactment of the statute.

It would seem as though it would be judicial legislation for the courts to hold otherwise, as there is nothing in the statute which says the award to the injured shall be other than it was recognized to be before the passage of the act. The statute does not say that a negligent order of a seaman in command shall give the injured employee the same right of compensation he would have were the ship unseaworthy or his injuries improperly taken care of. If Congress intended such a construction, it has omitted to so express its intention, and the courts have always held that they cannot supply the deficiencies of the legislature through reading into a statute a thought not expressed in it. An expression in the *Tonawanda Iron & Steel Co.* case recorded above suggests the District Judge for the Western District of New York held a contrary view. This, however, was purely dictum, as the court held the statute had no application to the facts in the csae then under consideration.

It therefore appears to us that the question raised in this appeal is novel and one upon which no authoritative decision has been rendered. We therefore urge the following points particularly, viz: That a review of the subject matter of the en-

actment shows that Congress was dealing solely with the welfare of seamen, and not with the welfare of shore workers. Illustrative of this idea is the abolition of flogging at sea and the arrest of deserters. As no such right ever existed with respect to longshoremen, this part of the legislation clearly settles solely upon seamen. Further illustrative of the idea that seamen were the sole consideration of Congress are the provisions in the act regarding attachment of seamen's wages, the rating of seamen, the certification of seamen for life-boat service, the equipment of life-boats, etc., punishments for disobedience, crews' space and hospital quarters on the ship—all which relate so clearly to seamen that they do not indicate Congress was contemplating others. So, when we come to section 20 of the act, the only class of persons mentioned in section 20 is seamen. In other words, the section does not mention longshoremen, dry dock men, wharfingers, messengers who may be running errands on shore or performing other services under the command of a seaman.

We may ask ourselves, why should Congress undertake to legislate for the protection of longshoremen? The longshoreman's contract is a state contract for work to be performed within the state, and if longshoremen are not properly taken care of, the state can legislate abolishing the doctrine of fellow servant, and protect the longshoremen.

whereas the state could not do so and modify the admiralty contract of the seamen. As stated by Judge Cushman, the longshoreman may leave his employment, whereas the sailor cannot do so; or, the longshoreman may barter for, and usually is paid, larger wages for the time employed than is the seaman. While a longshoreman has his remedies for injuries in admiralty, the states, of course, have protected him by giving him a lien on the vessel and permitting an attachment or receivership to enforce it in the state courts. Therefore, it seems that there is no reason why Congress should undertake to specially legislate in favor of longshoremen, and to impose upon the citizens of a state a policy with regard to its internal affairs which may or may not accord with its desires. It does not seem to us that the courts should read into the statute classes of people not mentioned in it in any respect, especially when the natural grammatical construction of the language of the particular section precludes the probability of Congress having contemplated including others than seamen. It does not seem that the force of general words when applied to a particular subject should be given latitudinal construction for the purpose of embracing classes of people about whom there is not an indication of concern on the part of Congress in any part of its legislation from its early history to date. Sailors have always been the wards of the admiralty—longshoremen, never.

Special legislation has always been enacted for the protection of seamen, and never has there been any legislation enacted for the protection of longshoremen. It seems it is not reasonably conceivable that Congress would depart from more than a century-old policy without indicating that intention in clear-cut phrases, instead of in a section which requires awkward construction—or, rather, reconstruction—to embrace the idea. In fact to include longshoremen in this section requires an absolute violation of a well recognized rule of construction laid down by the courts for many years—that is, the rule that qualifying words apply to the last antecedent.

Furthermore, legislation in Congress affecting state's rights has constantly met with opposition, and we doubt if some of the states which have enacted special legislation for the protection of longshoremen would not have raised their voice against the bill, had they understood it was to modify the state's policy.

While it may be of little consequence or weight, it is significant that the compilers of the Statutes at Large, the Compiled Statutes of the United States, the Navigation Laws of the United States of 1915 issued by the Bureau of Navigation, nowhere have indexed the law under longshoremen or other workers, but everywhere is it found under seamen.

Therefore, we respectfully submit that the subject matter of the Act of March 4, 1915, together with the subject matter of the acts amended by that act, the title of the act, the application of the ordinary rules of grammatical construction and of the settled rules of judicial construction, the absurdity of applying the act to longshoremen because of its deviation from a settled course of Congressional legislation, the imposing of a rule in construction of local state contracts which might or might not be agreeable to the sense of justice of the locality in question, the increased recoveries of longshremen over seamen, and other considerations which will occur to the court, all seem to us to indicate that longshoremen were not within the sphere of the persons about whom Congress was legislating. Therefore, that on the authority of the cases first cited herein, we submit, the judgment should be reversed, and the case dismissed.

Respectfully submitted,

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